PP v. KHOO CHONG BAN

COURT OF APPEAL, PUTRAJAYA
AZIAH ALI JCA
AHMADI ASNAWI JCA
ABDUL RAHMAN SEBLI JCA
[CRIMINAL APPEAL NO: W-05-308-12-2013]
12 JANUARY 2015

CRIMINAL LAW: *Dangerous Drugs Act 1952 – Section 39B(1)(a) – Trafficking in 395.7g of methylenedioxymethamphetamine – 3,390 pills suspected to be drugs seized from plastic bag carried by respondent – 200 out of 3,390 pills missing and failed to be produced at trial – Whether shortfall explained by prosecution – Whether break in chain of evidence – Whether cast reasonable doubt in prosecution's case*

CRIMINAL PROCEDURE: *Appeal – Appeal against acquittal – Trafficking in 395.7g of methylenedioxymethamphetamine – Doubt in drug exhibits – Whether there was break in chain of evidence affecting identity of exhibits – Whether exhibits had been tampered with – Whether gap in chain of evidence cast reasonable doubt in prosecution's case*

EVIDENCE: *Exhibit – Identity of exhibits – Doubt in drug exhibits – 3,390 pills suspected to be drugs seized from plastic bag carried by respondent – 200 out of 3,390 pills missing and failed to be produced at trial – Whether break in movement of exhibits could be equated with break in chain of evidence – Whether trial judge correct in finding that exhibits had been tampered with*

A total of 3,390 pills suspected to be drugs ('exhibits') were seized from a plastic bag which was carried by the respondent. The respondent was subsequently charged under s. 39B(1)(a) of the Dangerous Drugs Act 1952 for trafficking in 395.7g of methylenedioxymethamphetamine. When the exhibits were transferred from the investigating officer to the finger dusting officer, 200 out of 3,390 exhibits were found to be missing and were never produced during trial. The prosecution failed to provide any explanation regarding the shortfall. The trial judge found that the exhibits had been tempered with and acquitted and discharged the respondent. Dissatisfied, the prosecution appealed against the said decision. The issues that arose for determination *inter alia* were (i) whether the failure to produce 200 of the 3390 drug exhibits seized was fatal to the prosecution's case; (ii) whether a break in the movement of exhibits could be equated with a break in the chain of evidence; and (iii) whether the trial judge erred in finding that the exhibits had been tampered with.

Held (dismissing appeal; affirming order of acquittal and discharge)
Per Abdul Rahman Sebli JCA delivering the judgment of the court:

(1) Where the identity of the exhibits was in issue, any shortfall must either be explained by witnesses or by evidence. The burden to clear the doubt fell on the prosecution. Although there may be no break in the

movement of the exhibits, if there was tampering of the exhibits at any stage of the movement, the integrity of the exhibits would be compromised. This would constitute a break in the chain of evidence affecting the identity of the exhibits. Therefore, no break in the movements of exhibits must not be equated with no break in the chain of evidence. (paras 5, 8 & 9)

(2) Evidence of tampering, when detected, must be held against the prosecution unless satisfactorily explained. In the absence of what actually transpired at the time the 200 pills were removed from the rest of the exhibits, the inference was that the entire drug exhibits had been tampered with. Failure by the prosecution to close the gap in the chain of evidence had cast a real and reasonable doubt on the identity of the entire exhibits. (paras 10 & 11)

Bahasa Malaysia *Translation Of Headnotes*

Sejumlah 3,390 pil yang disyaki dadah ('ekshibit') telah dirampas dari beg plastik yang dibawa oleh responden. Responden kemudiannya dituduh di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 bagi pengedaran 3,957g methylenedioxymethamphetamine. Walau bagaimanapun, apabila ekshibit dipindahkan daripada pegawai penyiasat kepada pegawai cap jari, 200 daripada 3,390 ekshibit telah didapati hilang dan tidak dikemukakan semasa perbicaraan. Pihak pendakwaan gagal memberikan sebarang penjelasan tentang kekurangan tersebut. Hakim perbicaraan mendapati bahawa ekshibit telah diusik dan telah melepaskan dan membebaskan responden. Tidak berpuas hati, pihak pendakwaan telah membuat rayuan terhadap keputusan tersebut. Isu-isu yang timbul untuk dipertimbangkan, antara lain, adalah (i) sama ada kegagalan untuk mengemukakan 200 daripada 3,390 ekshibit dadah yang dirampas memudaratkan kes pendakwaan; (ii) sama ada suatu pemutusan dalam pergerakan ekshibit boleh disamakan dengan pemutusan dalam rantaian keterangan; dan (iii) sama ada hakim perbicaraan terkhilaf dalam membuat dapatan bahawa ekshibit tersebut telah diusik.

Diputuskan (menolak rayuan; mengesahkan perintah pembebasan dan pelepasan)

Oleh Abdul Rahman Sebli HMR menyampaikan penghakiman mahkamah:

(1) Apabila identiti ekshibit menjadi isu, apa-apa kekurangan hendaklah dijelaskan oleh saksi-saksi ataupun dengan keterangan. Beban untuk menjelaskan sebarang keraguan terletak pada pihak pendakwaan. Walaupun tiada pemutusan dalam pergerakan ekshibit, tetapi jika ekshibit telah diusik di mana-mana peringkat pergerakan, integriti ekshibit tersebut akan terjejas. Ini akan membentuk pemutusan dalam rantaian keterangan yang menjejaskan identiti ekshibit tersebut. Oleh itu, ketiadaan pemutusan dalam pergerakan ekshibit-ekshibit tidak boleh disamakan dengan ketiadaan pemutusan dalam rantaian keterangan.

(2) Bukti usikan perlu diputuskan bertentangan dengan pihak pendakwaan apabila dikesan kecuali ia dijelaskan secara memuaskan. Tanpa mengetahui apa yang sebenarnya berlaku ketika 200 pil dikeluarkan daripada keseluruhan ekshibit, kesimpulannya adalah keseluruhan ekshibit tersebut telah diusik. Kegagalan pihak pendakwaan untuk merapatkan jurang dalam rantaian keterangan telah menimbulkan keraguan yang sebenar dan munasabah mengenai identiti keseluruhan ekshibit.

Case(s) referred to:
Gunalan Ramachandran & Ors v. PP [2004] 4 CLJ 551 CA ***(dist)***
Hasbala Mohd Sarong v. PP [2013] 6 CLJ 945 FC ***(dist)***
Lew Wai Loon v. PP [2014] 2 CLJ 649 FC ***(dist)***
Loh Kah Loon v. PP [2011] 5 CLJ 345 FC ***(dist)***
Wan Yurillhami Wan Yaacob & Anor v. PP [2010] 1 CLJ 17 FC ***(dist)***

For the prosecution - Mohd Fairuz Johari; DPP
For the respondent - Geethan Ram Vincent; M/s Salehuddin Saidin & Assocs

[Editor's note: For the High Court judgment, please see PP lwn. Khoo Chong Ban [2014] 6 CLJ 775.]

Reported by Sandra Gabriel

JUDGMENT

Abdul Rahman Sebli JCA:

[1] In the High Court at Shah Alam the respondent was charged with trafficking in a dangerous drug and the charge against him is as follows:

> Bahawa kamu pada 08/11/2012 jam lebih kurang 9.00 malam di tepi SRJK (C) Sam Yoke, Jalan PPRT Seri Alam, Off Jalan Sungai Besi di dalam daerah Dang Wangi di dalam Bandaraya Kuala Lumpur, Wilayah Persekutuan telah mengedar dadah berbahaya iaitu 395.7 gram dadah 3,4-Methylenedioxymethamphetamine (MDMA). Oleh yang demikian, kamu telah melakukan kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] He claimed trial to the charge and was acquitted and discharged at the close of the prosecution's case without his defence being called as the learned trial judge found that no *prima facie* case had been made out against him. The prosecution is dissatisfied with the decision and hence this appeal. The single most important issue that calls for consideration is whether the failure by the prosecution to produce 200 of the 3,390 drug exhibits seized from the respondent is fatal to its case. The learned trial judge's finding was that the exhibits had been tampered with.

[3] The material facts are as follows. After the respondent's arrest, a total of 3,390 pills suspected to be drugs were seized from the plastic bag ('P3') that he was seen to be carrying. However, when the exhibits changed hands from the investigating officer ('SP6') to the finger dusting officer ('SP7') for purposes of finger dusting, 200 of the pills were found to be missing and were never produced at the trial. No explanation whatsoever was offered by the prosecution for the shortfall.

[4] It was submitted by learned counsel for the respondent both in the court below and before us that this defect in the prosecution's case had cast a reasonable doubt on the identity of the drug exhibits. The learned DPP submitted otherwise, contending that the failure by the prosecution to explain the shortfall is not fatal as the exhibits produced in court had been positively identified by the witnesses through the markings on the exhibits. It was further submitted that a shortfall of 200 out of 3,390 pills is a shortfall of no significance.

[5] With due respect to the learned DPP we have to say at the outset that the contention is without merit. The exhibits may have been marked and the number of missing pills miniscule relative to the total number of pills seized, but where the identity of the exhibits is in issue any shortfall must either be explained by the witnesses or is explainable by the evidence. Neither was forthcoming from the prosecution. We must emphasise that we are not here dealing with mere discrepancies in evidence but a total loss of exhibits in a capital offence.

[6] The markings referred to by the learned DPP does not clear the doubt as these markings were on the plastic packets and not on the pills themselves. Being in tablet form they were obviously indistinguishable one from the other. The cases cited by the learned DPP, namely *Lew Wai Loon v. PP* [2014] 2 CLJ 649; *Hasbala Mohd Sarong v. PP* [2013] 6 CLJ 945; *Gunalan Ramachandran & Ors v. PP* [2004] 4 CLJ 551; *Loh Kah Loon v. PP* [2011] 5 CLJ 345 and *Wan Yurillhami Wan Yaacob & Anor v. PP* [2010] 1 CLJ 17 are of no assistance to the prosecution as the facts and circumstances are distinguishable, the most significant of which is that those cases do not involve unexplained loss of exhibits before they were sent for analysis.

[7] The learned DPP further argued that since there was no break in the movement of the exhibits from the time they were seized to the time they were sent to the chemist for analysis there would have been no break in the chain of evidence. While we agree that there was no break in the movement of the exhibits, the fact that 200 of the pills went missing before they were sent to the chemist shows beyond any doubt that someone authorised or unauthorised had, for reasons best known to himself unlawfully interfered with the exhibits by removing them from the rest of the exhibits and never to be returned.

[8] In this scenario, the questions that demand immediate answers are: When were the 200 pills removed, who removed them, what was the purpose of removing them and more importantly what happened to the other exhibits before and after this person removed the 200 pills? The burden to clear this doubt falls squarely on the prosecution. We are not suggesting of course that in every case there must be no gap in the chain of explanation. It is only when the circumstances raise suspicion of tampering that such explanation becomes necessary. This is one such case.

[9] No break in the movement of exhibits must not be equated with no break in the chain of evidence. They are two different propositions altogether. There may be no break in the movement of the exhibits but if there was tampering of the exhibits at any stage of the movement, the integrity of the exhibits would have been compromised. That will constitute a break in the chain of evidence affecting the identity of the exhibits.

[10] Evidence of tampering whenever detected must be held against the prosecution unless satisfactorily explained. There are no two ways about it as the accused person leaves it entirely in the hands of the investigating authority to ensure that his case is fairly investigated. This realisation must be foremost in the mind of the investigating officer when investigating the case. It demands from him the highest degree of integrity, honesty and professionalism. Lest it be forgotten it is a person's life that is at stake.

[11] In the absence of explanation by the prosecution as to what actually transpired at the time the 200 pills were removed from the rest of the exhibits, the inference is that the entire drug exhibits had been tampered with notwithstanding the fact that the missing 200 pills came only from two of the nine plastic packets. In our view the failure by the prosecution to close this gap in the chain of evidence had cast a real and reasonable doubt on the identity of the entire exhibits.

[12] The question to ask in this regard is, can the court now be sure that the 3,190 pills (when it should be 3,390 pills) which were sent to the chemist for analysis and whose weight formed the subject matter of the charge were the same exhibits that were confiscated from the respondent? We do not think so and in line with fundamental criminal jurisprudence the benefit of the doubt must be given to the respondent, which the learned trial judge in fact did.

[13] The courts have time and again emphasised the need for the prosecution to ensure no break in the chain of evidence in drug trafficking cases. The law reports are replete with authorities on the consequences of such break which in some cases had resulted in outright acquittals as it led to doubts on the identity of the exhibits. There is therefore no excuse for

A lapses on the part of the investigating authority, be it the police, the customs or any other agency tasked with enforcing the drug laws. The stakes are too high for the court to ignore such shortcomings in the prosecution's case. In the circumstances we dismissed the public prosecutor's appeal and affirmed the order of acquittal and discharge.

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